STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

IN THE MATTER OF: The claim for reimbursement under the PECFA Program by

MADISON HEARING OFFICE
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Kenneth H. Riemer

Hearing Number 98-207
Re: PECFA Claim #53097-2704-60

PROPOSED HEARING-OFFICER DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to the Executive Assistant 'of the Department of Commerce, who is the individual designated to make the FINAL decision of the department in this matter.

STATE HEARING OFFICER:
Gretchen Mrozinski

DATED AND MAILED:
February 26, 2001

* *

MAILED TO:

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STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

In the matter of the claim for Reimbursement under
the provisions of the PECFA program by:

Kenneth H. Riemer
12160 North Wauwatosa Road
Mequon, WI 53097-2740

PECFA Claim No. 53097-2704-60
Hearing No. 98-207

PROPOSED DECISION

A decision of the Department of Commerce ("Department") concerning the Petroleum Environmental Cleanup Act ("PECFA") was issued on October 26, 1998, denying reimbursement for the claim submitted by Kenneth Riemer ("claimant"). The claimant timely appealed. A hearing was held on June 212 2000, before Administrative Law Judge Gretchen Mrozinski. Following the hearing, written briefs were received from the claimant and the Department. Thereafter the record was reopened and held open until January 14, 2001 for additional records from the Legislative Reference Bureau regarding the interpretation of the PECFA statute.

FINDINGS OF FACT

The claimant owned 150 acres of farm land at 12160 North Wauwatosa Road in Mequon, Wisconsin (the "Property"). The Property consisted of a contiguous block of land which was nearly square in size. The claimant used the Property for fanning activities. He farmed from 1981 through 1996. He raised hay and tended dairy cattle.

On the Property was located an underground, 500-gallon gasoline tank which the claimant utilized to fuel his farm vehicles. The tank was located on the Property from 1981 through 1993. The claimant did not sell gasoline from the tank. The tank was devoted solely to the claimant's farming activities.

In March 1993, the claimant had the tank removed by Key Environmental Services and T.J. Environmental Contractors. At that time, soil sampling and testing were performed. Gasoline Range Organics and benzene were found in the soil samples. The claimant reported the contamination to his local state legislator and to then-Governor, Tommy Thompson. He was advised by both that he should refrain from taking action since legislative amendments were pending to include farm tanks within PECFA coverage.

On June 7, 1996, the claimant completed and submitted a "PECFA Initial Application and Eligibility Request Form" (the “Eligibility Form”) to the PECFA program. The Eligibility Form asked the claimant the following question:

> FARM TANKS ONLY: Will you own 35 or more contiguous acres during the year preceding submission of the first claim? (Attach a copy of the most recent property tax bill.)

The claimant answered the question "yes" because he intended to submit his first claim for to PECFA either later in 1996 or in 1997. On June 7, 1996, the claimant, via Advent Environmental, notified the Department of Natural Resources ("DNR"), that there existed a petroleum release on the claimant's property. On June 26, 1996, the PECFA program assigned a claim number to the claimant's Property and/or site. At that time, the Department advised the claimant that it "appeared" that his Property was PECFA eligible. *Thereafter, in July 1996, the claimant sold 135 acres of the Property. He retained ownership of 15 of the acres, which included the contaminated area where the farm tank was located.*

On July 19, 1996, the DNR advised the claimant that the claimant was responsible for cleaning up the contamination.

William Morrisey, Director of the PECFA Program, testified that the intent of the legislature, in adopting amendments to include farm tanks within the coverage of PECFA, was to cover "active farms." Mr. Morrisey stated that PECFA coverage was not intended for hobby farms or antique stores operated out of old barns. Mr. Morrisey also testified that the intent of the legislature was for active farms to be covered only if the claimant owned 35 or more acres of contiguous land at the time that the claimant applied for PECFA reimbursement.

> A letter dated April 6, 1994, from Bob Lang, Director of the Legislative Fiscal Bureau, to all members of the Wisconsin Legislature, discusses the "farm tank" amendments as follows:
>
> > PECFA eligibility is expanded to farm undergound and aboveground tanks of 1,100 gallons or less. Provisions of SSA 1 to SB 15 were included as follows: (a) define farm as farm parcels of 35 or more acres of contiguous land devoted primarily to agricultural use; (b) require the owner or operator of the farm tank to receive a letter or notice from the DNR indicating that the owner or operator must conduct a site investigation or remedial action, or an order to conduct such an investigation or remedial action; (c) limit awards to no more than $100,000 per occurrence; (d) provide that no more than 5% of the total annual appropriation for PECFA awards could be used for farm tanks; and (e) direct DILHR to promulgate rules establishing a priority system for paying awards for farm tanks.

The above letter was prepared due to the number of requests that Mr. Lang had received regarding the Enrolled Senate Bill 15 (in which the "farm tank" amendments were included) and was intended to summarize that bill.

The 1993 Legislative Drafting records likewise advise that the amendments are meant to cover small, underground farm vehicle tanks.

STATUTES

Wis. Stat. § 101.143(4)(ei)

(ei) Awards for certain farm tanks . 1. A farm tank of 1,100 gallons or less capacity storing petroleum products that are not for resale, together with any on-site integral piping or dispensing system, is a petroleum product storage system for the purposes of this section, if all of the following apply:

a. The owner or operator of the farm tank owns a parcel of 35 or more acres of contiguous land which is devoted primarily to agricultural use, as defined in §91.01(l), including land designated by the department of natural resources as part of the ice age trail under §23.17, which during the year preceding submission of a claim under sub. (3) produced gross farm profits, as defined in §71.58(4), of not less than $6,000 or which, during the 3 years preceding that submission produced gross farm profits, as defined in §71.58(4), of not less than $18,000, or a parcel of 35 or more acres of which at least 35 acres, during part or all of the year preceding that submission, were enrolled in the conservation reserve program under 16 USC 3831 to 3836.

b. The owner or operator of the farm tank has received a letter or notice from the department of commerce or department of natural resources indicating that the owner or operator must conduct a site investigation or remedial action because of a discharge from the farm tank or an order to conduct such an investigation or remedial action.

ISSUES

The issue is whether Wis. Stat. §101.143(4)(ei) requires the claimant to own 35 contiguous acres at the time he submits his claim for reimbursement to the PECFA program, or whether he can own those acres at some other time and still be reimbursed by the PECFA program.

The Department contends that the claimant must own the 35 contiguous acres at the time his claim was submitted. The claimant contends that he need only own those acres during the year preceding his PECFA claim.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The undisputed evidence establishes that the claimant owned 150 acres of land that he farmed until July 1996. The undisputed evidence establishes that the claimant meets the requirements of Wis. Stat. §101.143(4)(ei), except for the dispute concerning when he was required to own at least 35 contiguous acres. Accordingly, the first step in resolving this issue is to look at the plain language of the statute and determine if an answer lies therein.

The language of Wis. Stat. §101.143(4)(ei) begins by advising claimants that a farm tank of 1,100 or less gallons is a petroleum product storing system--and therefore is likely covered by PECFA--if the claimant meets the following requirements. The first requirement states that the claimant "owns a parcel of 35 or more acres. . ." The word "owns" is a present-tense verb. However, nothing in this section states when the "owning" of the parcel must take place. The language of this section then goes

on to reference a different time period regarding the same parcel of land. That time period is the three years preceding the submission of the PECFA claim. Again, nothing in this section clearly advises the claimant when the "owning" of the parcel must take place. Moreover, the title of this section, or its parent sections, Wis. Stat. §§101.143(4) and 101.143(4)(e), do not shed light on whether the word "owns" applies to the time the claim was initiated or some other time. The titles are "Awards for petroleum product investigation, remedial action planning and remedial action activities," "Awards for certain owners or operators," "Awards for certain farm tanks." Nothing in these sections clearly require the claimant to own the 35 acres at the time the claim was filed. Also, nothing in these sections clearly allow the claimant to divest himself of the parcel before he files his claim and still have his costs covered by the PECFA program. The Department and the claimant have suggested alternative meanings for the section at issue. Both sides have made reasonable arguments and both meanings have reasonable attributes. The word "owns" could pertain to the time the claim is filed; it could pertain to the time the award is made; it could pertain to the time the contamination is discovered; it could pertain to the time the remedial action began; it could pertain to the time the contamination was reported to the Department and the DNR; and, it could pertain to the time that the PECFA program issued the claimant a claim number recognizing the claimant's claim. The word "owns" could also pertain to the "year preceding" the submission of the PECFA claim. With all of these different potential meanings and the lack of clarity from the, actual language, this tribunal finds the language of Wis. Stat. § 101.143(4)(ei) to be ambiguous.

When statutory language is ambiguous, this tribunal must look at the subject matter, object, context, scope and history of the statute to determine the legislative intent. See State v. Setagord, 211 Wis. 2d 397, 565 N.W.2d 506 (1997). In addition, this tribunal must consider how much deference to accord to the Department's interpretation of this statutory section. Absent explicit delegations, the courts and tribunals are not bound by an agency's determination of pure questions of statutory law; they do however, give agency determinations "great" or "due" weight in certain circumstances.

If the Department's experience and specialized knowledge aid the Department in its interpretation and application of the statute, the Department's interpretation is given "great weight." See William Wrigley, Jr., Co. v. DOR, 176 Wis. 2d 795, 500 N.W.2d 667 (1993). The second level of review provides that if the Department's interpretation is close to one of first impression it is entitled to "due weight." Finally, the third level of review is "de novo" and is applied in cases of clear first impression. This tribunal finds that the appropriate level of review is "de novo" given that the Department did not demonstrate that its experience and specialized knowledge make it better suited to determine what time frame the word "owns" pertains to. Moreover, the interpretation of the word "owns" in its statutory context does not require specialized Department knowledge or specialized technical knowledge. Finally, this matter is one of first impression for the department given that they have pointed to no other case where this issue has been decided. Accordingly, this tribunal finds that the interpretation of the statutory section at issue is strictly a matter of law and accordingly, the review will be "de novo."

"The cardinal rule in all statutory interpretation. . . is to discern the intent of the legislature... In addition, we must presume that the legislature intended an interpretation that advances the purpose of the statute." See Department of Transportation v. Wisconsin Personnel Commission, 176 Wis. 2d 73 1, 500 N.W.2d 664 (1993). The legislative history pertaining to Wis. Stat. §101.143(4)(ei), albeit scarce, does shed some light on the issue at hand, namely, underground farm vehicle tanks of less than 1,100 gallons are now included in the coverage of PECFA. The legislative history does not specify whether such tanks and the required 35 contiguous acres must be owned at the time the claim was filed. Rather, the legislative history demonstrates the legislature's intent to broaden the coverage of PECFA to include such farm tanks. Moreover, Mr. Morrisey, the Department's witness, testified that the intent of the legislature

was to cover "real and actual" farms, not hobby farms or retail stores being operated out of a former farm. Therefore the next step is determining the meaning of the section at hand, in accordance with the aforementioned intent.

The Department's interpretation of Wis. Stat. §101.143(4)(ei) is not unreasonable. The Department contends that "owns" must denote the time the claim is being filed because it is a present tense verb, because such an interpretation conforms to Department policy, and is consistent with other requirements that use the time of claim submittal as the benchmark for determining eligibility. However, this tribunal is not convinced that the Department's interpretation promotes the legislature's intent or that it is the most reasonable interpretation of the statutory section at hand.

First, Wis. Stat. §101.143(4)(ei) governs a claimant's status--is he/she a "real" farmer? This section does not govern timelines for filing a claim. Instead, it refers to the "definition" of a covered farm tank. As such, this tribunal is not inclined to read into this section an ownership requirement linked to a claim submission date merely because the word "owns" is a present tense verb. This would only add "timeliness substance" to a statutory section in which "timeliness substance" does not otherwise exist. Moreover, the only language in this section pertaining to the claim submission is the "year preceding submission of a claim." The focus is clearly on the "year preceding" not the claim submission date. Finally, the parent section, Wis. Stat. §101.143(4) focuses on "awards" for covered losses and what is a covered loss. The entire section governs the definition of covered losses. Such losses are not necessarily linked to the date the claim is submitted.

Second, the Department's interpretation undermines the alienation of land. Free alienation of land is ingrained in our society and is represented throughout our statutes and administrative rules. Restraints on alienation must be strictly construed. Therefore, if Wis. Stat. §101.143(4)(ei) was interpreted in the Department's favor, such interpretation would condone a restraint on alienation. The farmer must refrain from selling any portion of his/her 35 acres until the PECFA claim is filed-regardless of the status of the contamination—whether it was newly discovered, cleaned up or otherwise in the process of being remediated. Furthermore, the statutory section at issue does not require the farmer to continue farming until the claim is made. Why therefore must the farmer continue owning all of the farmland if he/she is no longer farming? To do so requires a restraint on the alienation of land-a condition that this tribunal does not find to be the legislature's intent.

Third, the Department's *PECFA Initial Application and Eligibility Request* form, which it provides to claimants prior to submitting a claim, clearly asks whether the claimant "will own 35 or more contiguous acres ***during the year preceding*** submission of the first claim?" (emphasis added). This form is evidence of the Department's interpretation of the statutory section at hand-at least during the timeframe of the claimant's claim. While the Department's interpretation may have changed thereafter, such change only shows that the statutory section at issue is open to multiple interpretations, even by the Department.

Fourth, the legislature's intent is better represented by an interpretation of Wis. Stat. §101.143(4)(ei) other than what the Department proffers. The legislature's intent was to include farm tanks in the coverage of the PECFA program. The legislature's intent was to weed out claimants who were not truly farmers, such as hobbyists or retail merchants. The Department's interpretation does not favor this intent. Rather, it hinders this intent. The claimant at issue farmed his land, which included the farm tank area, from 1981 through 1986. He did not sell antiques or operate a retail establishment out of his farm. He raised hay and tended dairy cattle. The tank at issue was used exclusively for his farm vehicles. He was a true farmer in every sense of the word. The Department argues that solely because he sold his land before filing his claim, that his claim must now be denied because he no longer owns "35

contiguous acres." But for selling his land, he was qualified in every other way. In addition, this is not a case where the farmer sold his land years before filing his claim and now seeks to rely on his past status as a farmer to collect via the PECFA program. This instead is a case where the claimant farmed until 1996--during the time the tank was removed, contamination was discovered and cleanup began. Under such circumstances, this tribunal does not find the legislature's intent followed or promoted by the Department's interpretation.

So what is the correct interpretation of Wis. Stat. § 101.143(4)(ei)? This tribunal finds that the correct interpretation is as follows. The word "owns" pertains to the "year preceding submission of a claim" if the farmer produced gross farm profits of not less than $6000, or to the "3 years preceding" submission of a claim if the farmer produced gross farm profits of not less than $18,000. Therefore, in the case at hand, the claimant/farmer at issue would need only own the 35 contiguous acres during the year preceding the submission of his claim. The claimant's claim was submitted in 1997, therefore he need only own the 35 contiguous acres as of 1996. Moreover, in the case of a farmer who made less than $6000 in the year preceding the submission of his claim, he would need to show that he earned gross farm profits that totalled $18,000 in the three years preceding the submission of his claim. Therefore in the latter case, if the farmer submitted a claim in 1997, he must show that in the combined years of 1996, 1995 and 1994, he earned a gross total of $18,000 in farm profits. Such total could be earned in 1994 alone, or a combination of all three years. If the total was earned in 1994 alone, the farmer/claimant qualifies as a "covered farm tank" regardless of whether they divested themselves of the 35 contiguous acres after 1994. They need only satisfy the above monetary amounts in farm 'profits in the year or three years preceding the submission of their claim. The above monetary amounts ensure that the farmer/claimant was a true farmer-that they truly fanned the property and earned farming income. That was and is the legislature's intent.

In addition, Wis. Stat. §101.143(4)(ei)(a) is made up of only one sentence. The "owns" language is inexplicably tied to the "year preceding" language. Such language is not separated by a period. It makes more sense to tie the word "owns" to the "year preceding language" as the "year preceding" language is a qualifier of the "owns" language. The essential meaning of this section reads as follows:

> The owner or operator of the farm tank owns a parcel of 35 or more acres of contiguous land which is devoted primarily' to agricultural use, . . . which during the year preceding submission of a claim . . . produced gross farm, profits . . . of not less than $6000 or which, during the 3 years preceding that submission produced gross farm profits ... of not less than $18,000, or a parcel of 35 or more acres of which at least 35 acres, during part or all of the year preceding that submission, were enrolled in the conservation reserve program...

The word "owns" refers to the remaining portion of the sentence-not to the time the claim is submitted. This interpretation is reasonable, logical and leads to no absurdities in the application of this section. Furthermore, the legislature's intent is fulfilled as only true farms are covered.

This tribunal therefore finds that the claimant, Kenneth H. Riemer, properly submitted a claim in accordance with Wis. Stat. § 101.143(4)(ei), concerning a covered farm tank and therefore has established site eligibility. The investigation and remediation costs associated therein are covered under the PECFA program.

DECISION

The Department's decision of October 26, 1998 is reversed. The claimant has established site eligibility. The claimant's investigation and remediation costs are covered under the PECFA program, assuming such costs are otherwise eligible.

BY

Gretchen Mrozinski
Administrative Law Judge